

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: GRANULATED SUGAR) File No. 24-md-3110
ANTITRUST LITIGATION) (JWB/DTS)
)

)
) St. Paul, Minnesota
) August 20, 2024
) 2:06 p.m.
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BEFORE THE HONORABLE JERRY W. BLACKWELL
UNITED STATES DISTRICT COURT JUDGE
AND THE HONORABLE DAVID T. SCHULTZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

(STATUS CONFERENCE)

Proceedings recorded by mechanical stenography;
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APPEARANCES

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1 Also present on behalf of Plaintiffs:

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14 Michele Burkholder
15 Karen Halbert
16 Mike Roberts
17 Erich Schork
18 Garrett Blanchfield
19 Elizabeth Fegan
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Also present on behalf of Defendants:

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Please be seated. Would you please call the case.

THE COURTROOM DEPUTY: We are here for the matter of Granulated Sugar Antitrust Litigation, Case Number 24-md-3110 JWB/DTS.

THE COURT: Good afternoon to all of you.

ATTORNEYS: Good afternoon.

THE COURT: I was going to say, you can say that. I am here with Judge Schultz who will be your Magistrate Judge on this case, and we are honored to be your judges on this case and we are pleased about it. And we can tell you that given your anticipated good conduct and professionalism, that you will help us to remain pleased to be your judges on this case.

Let me ask, I've got here the sign-in sheets from everyone. Is there anyone appearing today who has not signed in already?

All right. Then I won't go through the appearances. The appearances will be taken from the sign-in sheets.

And so what we plan to do this afternoon is just to get acquainted a little bit. This is just the beginning

1 of our table setting in the case. I've got some ideas and
2 thoughts about it, and there's some things I want to run
3 past you and then we want to hear from you also.

4 So with that said, have you sorted out who might
5 initially be speaking on behalf of the plaintiffs and/or the
6 defendants? So who's going to come up initially and speak
7 for the plaintiffs?

8 MR. HEDLUND: Good afternoon, Your Honor. Dan
9 Hedlund, Gustafson Gluek, on behalf of Northern Frozen Foods
10 and direct purchaser plaintiffs and other plaintiffs at
11 times, although they appear for themselves also.

12 THE COURT: So why don't you come on up initially
13 and -- because I want you to assume that Judge Schultz and I
14 don't know much about this other than we both eat sugar and
15 I eat more than he does.

16 And so if you would, just for starters, I
17 understand that there essentially are three tranches here
18 from -- the direct purchasers and then we have two
19 categories of indirects, the consumers and commercial.

20 MR. HEDLUND: That is correct, Your Honor.

21 THE COURT: Can you -- who is in each? I can say
22 the names, but I don't know exactly what it means. If -- if
23 I've got a grocery store, is that an indirect? Can you help
24 to set the table for us a little bit?

25 MR. HEDLUND: Yes, Your Honor. And if my

1 colleagues from the other classes wish to correct me on how
2 they are defining themselves, I'll let them step up.

3 THE COURT: Let me ask by the way, too, for the
4 defendant, is there a spokesperson for the defendant here?

5 MR. BUTERMAN: Good afternoon, Your Honor.
6 Lawrence Buterman from Latham & Watkins. I represent United
7 Sugar. I'll be doing the bulk of the speaking today, but my
8 colleagues are representing some of the other defendants.

9 THE COURT: All right. Then why don't you come on
10 up and stand next to him at the podium. That way if he's
11 wrong, you correct him right away.

12 So with that said, you were giving us just at
13 30,000 feet.

14 MR. HEDLUND: Sure, Your Honor. I'll just note
15 for the record that as the Court may be aware, there have
16 been several other cases around the country involving
17 protein, for example. There's a *chicken* case in Chicago and
18 then there's a *turkey* case there and then there's a *beef*
19 case here in Minnesota in front of Judges Tunheim and Judge
20 Docherty and there's also a *pork* case, which I suspect, you
21 know, you're both aware of.

22 But in any event, these types of food commodity
23 cases have essentially broken out into three tracks, with
24 direct purchaser plaintiffs, who I'm here on behalf of.
25 Those consist mainly of large purchasers. Some examples

1 might be like Sysco and U.S. Foods. We don't represent
2 those -- those entities directly here, but those would be
3 examples. There could be --

4 THE COURT: So are these even potentially
5 resellers then?

6 MR. HEDLUND: Yes. That is what they do. They
7 are distributors or resellers of sugar.

8 There's also grocery chains that are large enough
9 that it makes sense for them to purchase sugar directly and
10 then stock their stores and then sell to the consumers.

11 THE COURT: Are there then manufacturers who are
12 also buying directly?

13 MR. HEDLUND: Like soda manufacturers, that sort
14 of thing?

15 THE COURT: Yeah, well, that's one good example of
16 the --

17 MR. HEDLUND: Yes, yes. We currently don't
18 represent a plaintiff like that, but I suspect, yes, if you
19 were to look at it, and perhaps Mr. Buterman could confirm,
20 but that Coca-Cola, for example, I would think would be a
21 direct purchaser.

22 THE COURT: And what about governmental entities,
23 are any of those at play?

24 MR. HEDLUND: They may -- they may be direct
25 purchasers, but typically in our class definitions, we

1 exclude them from the class, and so it remains to be seen,
2 but I think that probably some of them are direct
3 purchasers.

4 THE COURT: All right. So for the commercial
5 entities, we can have commercial direct and commercial
6 indirect?

7 MR. HEDLUND: For the -- so in terms of the --
8 what I would describe as the consumer class, those would be
9 anybody who goes to the store and buys sugar. That's
10 probably one of the more straightforward ones.

11 And then the commercial indirects are going to be
12 primarily -- and, again, folks from that class can speak up
13 if they -- if they disagree -- but I think mostly like
14 restaurants, bakeries, that sort of thing. So people who
15 will buy the sugar and then convert it into a product or a
16 meal or a -- you know, a baked good that then they turn and
17 sell to consumers.

18 THE COURT: All right. Thank you for that. Are
19 there any recent developments in the case? This is just my
20 checking in on where are we.

21 MR. HEDLUND: Yeah, so, I would say obviously as
22 the Court is aware, because we're all here, the panel, in
23 its wisdom, chose to send the cases here to Minnesota, which
24 one panel has described as the sugar beet capital, so I was
25 proud to hear that out at the hearing.

1 But we are here now. All the cases I think are
2 organized. I think there's now, last I checked, 55 cases.
3 I believe 54 cases have been reassigned to yourself and to
4 Judge Schultz. There may be one that hasn't been, although
5 maybe that happened today.

6 There's been -- as the Court is aware, my class
7 submitted on July 3rd, a proposed leadership slate for the
8 direct purchaser plaintiff class. Last Friday the
9 commercial indirect class submitted a proposed leadership
10 slate. And the consumer class, as I understand it, proposes
11 to submit papers for what looks to be a contested motion I
12 think a week from today, on August 27th, with replies due
13 one week later -- or maybe eight days later, September 4th.

14 But, otherwise, the -- I think the latest would be
15 that we were pleased to see PTO Number 1 come out, and we
16 have been working, I believe, cooperatively with defense
17 counsel on the joint documents that we submitted for today's
18 conference. But I think it's just been a lot of sort of
19 organization and sort of figuring out where things are.

20 But, Mr. Buterman, you can weigh in.

21 MR. BUTERMAN: The only thing I would add,
22 Your Honor, is that there had been a issue. One of the
23 defendants, Richard Wistisen, the plaintiffs I believe had
24 been trying to serve and had been unsuccessful. We were
25 contacted by an individual who indicated that he's in the

1 process of working -- an attorney -- working with
2 Mr. Wistisen about potential representation. So we provided
3 that information to the plaintiffs, and I think that they
4 are going to take it from there and deal with that issue.

5 THE COURT: So that service issue might get worked
6 out then essentially?

7 MR. BUTERMAN: I think that's what may happen,
8 probably.

9 MR. HEDLUND: For the plaintiffs, we're hopeful
10 that now that we have potential lawyers representing
11 Mr. Wistisen and the commodity entity, that we'll be able to
12 work out some sort of service with them.

13 THE COURT: In terms of the overall kind of
14 breakdown of number of cases in the different tranches, my
15 numbers aren't as current as of today, but at -- this was
16 some point at the end of I suppose last week where I had 5
17 direct purchaser actions, 33 commercial indirect, and 15
18 consumer indirect. But for the addition of a couple of
19 others that you mentioned, is that the basic breakdown
20 though?

21 MR. HEDLUND: Your Honor has numbers at the ready
22 better than me, but I believe the last I checked, it was
23 something very similar to that, yes.

24 THE COURT: All right. Do you have a different
25 understanding?

1 MR. BUTERMAN: No, Your Honor.

2 THE COURT: And I take it there's still no state
3 litigation to speak of?

4 MR. BUTERMAN: There's no state litigation or
5 other litigations.

6 THE COURT: All right. So anybody have any kind
7 of projection for what might be the total number of
8 anticipated member cases? What are you thinking? I'm not
9 holding you to it at all. I'm just myself crystal gazing
10 so --

11 MR. HEDLUND: Yeah, just from past experience in
12 cases, I think now that we are at the point where we're at
13 and we are having the initial conference with the Court,
14 that the -- the cases will trickle, if perhaps not stop. I
15 wouldn't at this point anticipate on the plaintiffs -- you
16 know, the plaintiffs filing a lot more cases.

17 THE COURT: All right. Let me move on to a
18 different subject, which is tutorial day for the Court.
19 It's something I always found useful as a practitioner, was
20 always happy if a Court asked for one. This Court is asking
21 for one, and I wanted to get your reactions to the idea.

22 MR. BUTERMAN: Your Honor, on behalf of the
23 defendants, we think it's a great idea. The sugar industry
24 is very complex. I spent years representing one of the
25 companies involved in that DOJ litigation that took place in

1 Delaware several years ago, which is the impetus, I guess,
2 for the allegations here.

3 And so we would welcome the opportunity to be able
4 to explain to Your Honor the entire process because it's
5 very informative, not only how sugar is produced, but how
6 it's sold in this industry. There's a very, very
7 significant regulatory overlay, which Judge Noreika found
8 particularly important in analyzing the merger litigation in
9 Delaware. So we would welcome the opportunity to share that
10 with Your Honor.

11 And also we believe that some of the complexities
12 with respect to how sugar is sold in this country actually
13 play into the allegations here, including the fact that
14 95 percent of all sugar in the United States is sold through
15 long-term contracts. And what -- what we will all learn at
16 some point is that the information that the plaintiffs are
17 alleging was shared here has nothing to do with long-term
18 contracts. It has to do with the spot market, which is a
19 very distinct market of only about 5 percent. And that's
20 information that's not competitively sensitive. It's shared
21 with the USDA, which our tutorial will explain.

22 So we would very much welcome the opportunity to
23 get that information and get it out quickly also for the
24 plaintiffs because I think it might help them in their -- in
25 their understanding of some of the issues here.

1 THE COURT: Well, Mr. Hedlund, you're probably
2 wondering what you are doing here then.

3 MR. HEDLUND: Yes, Your Honor. So our position on
4 this is we're -- we're not wholesale opposed to it,
5 especially if the Court believes it would be --

6 THE COURT: Wait a minute.

7 MR. HEDLUND: -- if the Court is interested.

8 THE COURT: Wait. Did you say you are not
9 wholesale opposed?

10 MR. HEDLUND: I mean, we think that -- because
11 this has come up in some of the other cases. For example,
12 in the *pork* MDL that Judge Tunheim has, the defendants
13 requested a similar type of day, and -- but it was later in
14 the case, around the time of class certification. And at
15 that time, the -- Judge Tunheim decided that -- you know,
16 that it could be addressed at the class certification
17 hearing and that that would be sort of the appropriate place
18 to handle it.

19 I think on the plaintiffs' side, we feel a little
20 bit like the defendants -- well, certainly their clients,
21 you know, give them a lot of information about how the
22 industry works, but we get a little bit worried that if it
23 becomes a tutorial day, it becomes sort of also kind of a
24 advocacy day that could just sort of expand time on the
25 motion to dismiss. So that would be our primary concern.

1 So not -- not opposed, but think it would be more
2 appropriate sort of later in the case.

3 THE COURT: I hear you, and the only problem with
4 that is I want to know about it on the front of the case.
5 And there obviously are a number of wrong ways that one can
6 go about a tutorial day. Nobody is going to win the case or
7 lose it from a tutorial day. So this is just, to me,
8 setting the stage so that we have some better understanding
9 of what the industry is and frankly how it functions, what
10 the different parts are.

11 So I'm going to ask the two sides to come together
12 anyway in proposing what might be an approach to it so that
13 it isn't a free kick at the goal on some dispositive issue
14 in the case. I'm not really interested in legal argument at
15 all, and I can probably hear what a legal argument is in
16 context. For me, this is meant to be factual to understand
17 certain technical aspects of the case that I wouldn't
18 understand otherwise. I presume out of it, I'll get
19 something that looks like a glossary, because though I don't
20 know this, I'm almost certain that there is a whole lexicon
21 that goes with this of things I'll need to understand.

22 So it's to get some basic understanding on the
23 front end. There are different ways it can be done. It
24 doesn't have to be necessarily in person. It can be done by
25 submissions potentially. I think I prefer in person. There

1 wouldn't be -- it could be lawyer presentations. It could
2 be you decide to put on a witness of some kind. Nobody is
3 subject to cross-examination. It's all for the Court's
4 education.

5 And I wouldn't intend to have it on the record at
6 all. This is purely for the Court's information and
7 education. If the parties felt differently about that, I
8 would certainly hear you out on it.

9 But I say that because the intent isn't to be, in
10 my mind, making a record that goes to any motion or issue.
11 I wouldn't have the expectation at any point in the case
12 that somebody refers back to something that was said at
13 tutorial day. Just presume that your argument went to mute
14 when you said that, and I just didn't even hear it, because
15 that's not the point of it. And it's just to get an
16 education on the front end so that, frankly, I better
17 understand your case. And if you don't want me to
18 understand your case to class cert phase, I might wonder
19 about your case if you want me to wait that long. I
20 wouldn't, but...

21 So in any event, I'll hear you out on it, and
22 ultimately, if it proves to be a bad idea, I won't do it.
23 And if there's no way to find any sort of common ground to
24 educate, I'll just learn in progress and by osmosis or
25 however the Courts do. But I raise it as something that I

1 found helpful as a practitioner. Granted I probably stood
2 at podiums to your left more often than not, but -- in fact,
3 I think I may have even done a science day back when in
4 front of you. No, it was before your time.

5 MAGISTRATE JUDGE SCHULTZ: I wasn't there yet.

6 THE COURT: It was before your time. I remember.

7 All right. So stay tuned on that. That even from
8 this hearing today, there will be a number of different
9 dates for things that will emerge and will come out of this,
10 and there will be reference to that in it too where I'll ask
11 for a joint submission from you all.

12 So can we move on now to talk about the points
13 that are set forth in the proposed joint agenda from the
14 parties? And that is scheduling, discovery plan, and
15 proposed case management order. Let me turn to it.

16 MR. HEDLUND: Your Honor, I know one part of that
17 was the outlines of plaintiffs and defendants' respective
18 views of the primary facts, allegations, claims and defenses
19 involved in the litigation. Is -- if -- one of my
20 colleagues was going to address that issue if that is what
21 you would like to move to next.

22 THE COURT: Perfectly fine, and that's a fine
23 place to start. Is it Buterman or Buterman?

24 MR. BUTERMAN: Buterman, Your Honor.

25 THE COURT: Buterman.

1 MR. BUTERMAN: Yes.

2 THE COURT: All right. You can take your seat
3 while that occurs, and then I'll have you come up then
4 afterward.

5 MR. BUTERMAN: Thank you, Your Honor.

6 MR. HEDLUND: Thank you, Your Honor.

7 MS. BERNAY: Good afternoon, Your Honor.
8 Alexandra Bernay from Robbins Geller Rudman & Dowd. I'm
9 associated with the Fowler case, which is one of the
10 consumer indirect actions.

11 So I just thought that I would spend a little bit
12 of time talking about what our case -- just a sum-up of our
13 case and address some of the points that were in defendants'
14 briefs, but happy to take any questions you may have.

15 THE COURT: No. No. So in brief, so no more than
16 a few minutes really.

17 MS. BERNAY: Sure. So at its highest level, this
18 is a case where in a market with numerous characteristics,
19 such as, a high barrier to entry market concentration and a
20 prior history of anticompetitive conduct, the exchange of
21 proprietary highly competitively sensitive nonpublic
22 internal information on pricing, future plans, spot pricing,
23 pricing strategies, crop yields, sold positions and the
24 like, plaintiffs allege that that allowed defendants to
25 raise, fix, maintain or stabilize granulated sugar prices in

1 the United States from January 1st, 2019, to present; and as
2 a result, plaintiffs paid artificially inflated prices in
3 excess of what they would have paid in a competitive market.

4 In the briefs that defendants cited, they refer to
5 this as a follow-on case. That is just not the case. It is
6 not a follow-on case. Certain evidence that was --

7 THE COURT: Follow-on to the DOJ action, you mean?

8 MS. BERNAY: Yes, correct. That case was a merger
9 case dealing with concentration in the southeast United
10 States, and it was a merger between U.S. Sugar and Imperial.
11 And the Court held there that the market was not properly
12 defined. That was really the end of it.

13 Here, in this case, some of the evidence that
14 plaintiffs rely on was in the record of the DOJ case. It
15 revealed a conspiracy using this conduit, Mr. Wistisen, and
16 commodity information. Defendants claim that the -- in
17 their brief that the DOJ action implicitly found that the
18 allegation of an illegal conspiracy was without merit.
19 That's just not the case. The DOJ never brought a Section 1
20 claim there.

21 THE COURT: Well, that was a Clayton Act case and
22 this is a Sherman Act case, and I'm pretty sure I'm not
23 going to decide that kind of an issue *a priori* based on
24 frankly anything that might have been said from that other
25 action.

1 MS. BERNAY: Sure.

2 THE COURT: It will be addressed on its own
3 merits.

4 MS. BERNAY: One of the interesting things that
5 did come up and you heard the defendants mention it just now
6 regarding the tutorial, however, was that certain USDA
7 regulations basically immunized their conduct. And I just
8 wanted to point the Court to what the Third Circuit said
9 regarding that argument, which was, quote, No argument was
10 presented that any statutory provision immunizes the sugar
11 industry against antitrust challenges. That's at 74 F.4th
12 197 at 208. And also the Court there noticed that that line
13 of reasoning was improper, and also said that price supports
14 do not create immunity from antitrust.

15 Defendants also make a couple other arguments
16 claiming that here there was a failure to show direct
17 communications. That's just not the law. The test really
18 is, you know, were these communications shared. That's a
19 well-expected -- accepted theory in antitrust laws.

20 We think we have a very strong case here. Usually
21 cases have indirect proof and then you add on some economic
22 analysis. Here, we actually have direct evidence of
23 widespread sharing among admitted competitors. The sharing
24 was the most competitively sensitive information, as I
25 mentioned earlier, and that, coupled with the economic

1 evidence of rising prices without a change in supply, we
2 submit makes this a very strong case.

3 I'm happy to answer any other questions you might
4 have, Your Honor.

5 THE COURT: No. No. Thank you.

6 MS. BERNAY: Thank you.

7 THE COURT: So let me hear from the defense.

8 MR. BUTERMAN: A few points, Your Honor. So just
9 so the -- the backdrop is clear here, in 2021, the Justice
10 Department sought to block the acquisition of a company
11 called Imperial Sugar by a company called U.S. Sugar. That
12 was a Section 7 Clayton Act that followed after an
13 investigation. And during the course of the litigation, the
14 Department of Justice introduced a theory of -- that the
15 transaction would lead to anticompetitive coordinated
16 effects. And what they said was we're concerned that after
17 U.S. Sugar owns Imperial, there will be more coordination
18 amongst sugar producers in the United States.

19 And they sought to prove that by saying that there
20 was coordination already going forth in the industry. And
21 they pointed to Mr. Wistisen. Mr. Wistisen is an
22 individual. He produces a analyst report, which contains
23 basic information in the industry. That analyst report is
24 widely sold. It's used not only by defendants, but it's
25 also used by sugar purchasers throughout the United States.

1 And it is used by the U.S. Department of Justice -- excuse
2 me, the USDA, the U.S. Department of Agriculture in putting
3 out the information that they put out. And as I said
4 earlier, the USDA puts out a lot of robust information.

5 So I heard a lot of buzz words, "widespread,"
6 "most sensitive." Your Honor, with respect, when one looks
7 at the information, that is far from the truth. And on
8 that, I will say that while it is not dispositive, Judge
9 Noreika, in the District of Delaware, did get to see all
10 that evidence. It was all presented to her. And she looked
11 at it and she told the Department of Justice in closing
12 arguments, this just does not seem to be different from what
13 happens in every industry. It is not price fixing in my
14 view.

15 Now, counsel is correct, there wasn't a Section 1
16 claim. That would have been a much, much higher burden for
17 the Department of Justice. And they never even sought to
18 make a Section 1 claim. They said specifically to the
19 Court, we're not saying that this conduct rises to price
20 fixing. We don't need to meet that burden. They couldn't
21 even meet the lower burden that they had presented.

22 The reality is, Your Honor, as I said earlier,
23 that when it comes to -- it comes to how pricing is done in
24 this industry, it is very complicated, but one thing that
25 will become abundantly clear is that it has nothing to do

1 with the type of information that was produced through these
2 ordinary industry reports.

3 There's some other things that I think, though,
4 that are very important here. Your Honor, it's -- that case
5 was decided in 2022. The trial ended in April of 2022.
6 Judge Noreika's decision was in September of 2022.

7 As far as I know, no one of the defendants -- and,
8 again, you know, I can speak certainly on behalf of my
9 client and I've tried to figure this out, no one has spoken
10 to Mr. Wistisen in years. So the idea that somehow pricing
11 in the industry is the product of the defendants sharing
12 information over the last years, doesn't even pass -- pass
13 muster. There just haven't been communications with
14 Mr. Wistisen during that time.

15 Counsel made a point about immunization and
16 suggestions that we had argued that there was some sort of
17 immunization here because of the role of the USDA. The
18 actual sentence that counsel read to you from the opinion
19 said specifically that no argument was presented on that.
20 We never made any sort of argument, and we never suggested
21 that there's any kind of blanket immunity with respect to
22 the USDA.

23 However, the role of the USDA in setting prices,
24 in regulating prices is critical here because what the USDA
25 does do is it manages price. And so if the USDA -- the USDA

1 has -- there's a farm bill. And as part of that farm bill,
2 the USDA ensures that there is a appropriate supply of sugar
3 in the United States and it has various levers, including
4 its ability to impose certain tariffs on imported sugar in
5 order to make sure that the price is where the USDA
6 determines it should best be.

7 And so those are, again, some of the complicated
8 things that we're going to talk about here. But the notion
9 that the plaintiffs are trying to present here, which is,
10 this is a simple straightforward issue, Mr. Wistisen, this
11 one individual who publishes one of -- you know, one
12 newsletter somehow is sharing information and that's causing
13 prices throughout the United States to go up for sugar is,
14 with all due respect, a fallacy that's so devoid from the
15 realities of how this industry operates that we believe it's
16 not going to come close to meeting the plausibility standard
17 under *Twombly*.

18 THE COURT: All right. Thank you.

19 So, Mr. Hedlund, do you want to come back up?
20 Yeah, I think for the time being, I won't need to hear
21 anything about the status of discovery in the other cases
22 and so on. We'll talk about ultimately a schedule here.

23 Why don't we move on and talk about ESI, if there
24 are any issues that the Court needs to understand about
25 electronic discovery.

1 MR. HEDLUND: Thank you, Your Honor. Again, Dan
2 Hedlund, Gustafson Gluek, for the plaintiffs.

3 I'll tell you where I think things are at; and if
4 there's more particular questions you have about ESI, I have
5 someone who can -- who is extremely knowledgeable about
6 that. But I think both with regard to electronic discovery,
7 and I know one of the other things on the agenda is the
8 protective order, which if I can group those together --

9 THE COURT: You can put them together, yeah.

10 MR. HEDLUND: Okay. You know, we, on the
11 plaintiffs' side, and our colleagues on the defense side,
12 are all, you know, extremely experienced lawyers, also known
13 as old maybe in some cases. But, in any event, we have been
14 through many cases like this where at the beginning, we --
15 you know, we go about negotiating, you know, a protective
16 order, ESI protocol. Oftentimes, the parties and counsel
17 are able to agree and we don't need any assistance from the
18 Court, although from time to time there are certain things
19 that are not agreed upon and the -- and the input from the
20 Court is very helpful.

21 So I think that both of those would be items that,
22 you know -- in our schedule we put forth some dates by
23 which -- you know, deadlines for submissions of those. The
24 defendants' view of when they should be completed is a
25 little bit different, but I think we -- I believe

1 Mr. Buterman would agree, that probably the first step with
2 those two items, once we agree upon the time to begin
3 negotiating them, would be to roll up our sleeves and try to
4 reach agreement on those, and, if not, then to reach out to
5 the Court for assistance.

6 THE COURT: Right. And you'll discuss that with
7 Judge Schultz when the time comes, but there are no issues
8 with respect to either protective order or e-discovery for
9 now?

10 MR. HEDLUND: I don't believe so, Your Honor.
11 Your PTO Number 1 discussed preservation, and so I
12 understand the parties are all on the same page on that.

13 As we also referenced, you know, we believe that
14 it will be appropriate to set up document repositories for
15 documents on both sides, separate ones, and that, you know,
16 documents should be produced in a searchable format. But at
17 this point, I don't think there's anything that needs to be
18 addressed by the Court.

19 THE COURT: All right. So just as a kind of
20 housekeeping matter, when I think about discovery issues in
21 hard-fought litigation, complex lit amongst experienced, you
22 know, practitioners, I just want to underscore how important
23 it is that you use rules of reason with respect to things.
24 It's probably -- I probably wouldn't be qualified, myself,
25 to be a Magistrate Judge like Judge Schultz until I was at

1 least five years away from private practice, just because I
2 think I still have my own after-effects of discovery
3 disputes as a litigator. And any number of them I find not
4 to be legitimate disputes. That either there's somebody
5 wanting something that they are not really entitled to or
6 withholding something that you know you ought to produce.

7 And so I -- I tend to veer toward, and I don't
8 start this way, but I get there pretty quickly in big
9 litigation, to a bring your checkbook rule. And I don't
10 even intend that as a sanction. So if there is a bring the
11 checkbook order, the order will be written in a way that
12 says, this is not a sanction. It's just letting the
13 burden -- the economic burden fall where it should.

14 That if you decide to take a flier and it really
15 wasn't a close motion, God bless you for trying, but you
16 should probably pay for that flier and not the other side
17 and to think twice before you simply launch, you know,
18 various missiles that may not -- may not really be worth --
19 the stick may not be worth the candle.

20 And I have been myself in any number of the client
21 meetings where a certain idea starts off with everybody in
22 the room knowing that's not a great idea, you know. Client
23 says it is, and before it's done, everybody is going, Good
24 answer, good answer. And you get to Family Feud, survey
25 says, you know, (indicating), and the survey said that from

1 the beginning.

2 So I really do encourage there to be, you know,
3 rules of reason. And that's not to discourage you from
4 being zealous advocates. I think you should be on behalf of
5 your clients, but litigation is expensive, and I recognize
6 that, so for -- it may be that some of the forays that you
7 engage in, I'm not sanctioning you, it's simply shifting the
8 economic burdens to where I think they should lie on certain
9 issues, so I have got a middle ground that's not a sanction
10 but it will be shifting of the economics as a default rule.
11 And I discussed that with Judge Schultz, and we think it's a
12 respectable way to go. So I wanted to make sure everybody
13 was aware of that.

14 Do you have anything then further, Mr. Hedlund?

15 MR. HEDLUND: No. We -- like always, we
16 appreciate the insight of Your Honor and Judge Schultz as we
17 go forward in this case, and, so nothing further on those
18 topics.

19 THE COURT: And, Mr. Buterman, anything from you
20 on these subjects?

21 MR. BUTERMAN: Nothing, Your Honor, except to just
22 re-emphasize that I fully expect that we're going to be able
23 to work cooperatively with the plaintiffs on these issues of
24 ESI and protective orders and the like, and we've, you know,
25 had the pleasure of working with many on the other side on

1 many cases and have had good relationships and see no reason
2 why we can't have that here as well.

3 THE COURT: Right. All right. And I fully expect
4 there to be many different arguments on the relevance of the
5 DOJ opinion, and I expect even there may be times where the
6 same party is saying it is relevant and not relevant
7 depending on what the issue is. In fact, I see some of that
8 already in what's been submitted. Fine. I mean, that's
9 fair game for what it's worth.

10 So while you are up there, why don't we talk about
11 the issue of the modification of the discovery stay, and
12 this is less for -- I'll give you a chance to respond or
13 react to it, but I intend to be very practical and pragmatic
14 in how we go about things. I don't see an occasion where I
15 would agree, even if there were already consolidated
16 complaints in existence and even if we were past the motion
17 to dismiss, where I would just say, load up everything from
18 the DOJ action, just ship it over for starters. That
19 probably won't be the way.

20 That the discovery rules and their requirements
21 are quite a bit more refined than that for what is going to
22 be discoverable, but the rules of reason, to me, would be
23 that we wait first until we get into place consolidated
24 complaints. I have already heard from Mr. Buterman that
25 there will be motions to dismiss, and so let's get those

1 sorted out too and then get to discovery in earnest would be
2 the way that I would intend to approach it.

3 Now having said it, I'll stop and hear from you,
4 Mr. Hedlund.

5 MR. HEDLUND: Your Honor, this is another one of
6 those where I've -- I would defer to one of my colleagues if
7 it's okay, Ms. Justice.

8 MR. BUTERMAN: And, Your Honor, is it okay if I --

9 THE COURT: It is, Mr. Buterman. Yeah, sure.

10 MR. BUTERMAN: Thank you, Your Honor.

11 MS. JUSTICE: Good afternoon, Your Honor.

12 Kimberly Justice from Freed Kanner London & Millen. I
13 represent Plaintiff WNT, LLC which was the first filed case
14 in this district, a commercial indirect plaintiff.

15 I hate to get started from behind but that seems
16 like that's where I am right now. But I did hear two --

17 THE COURT: It depends on how you define a win.

18 MS. JUSTICE: A win, the documents. And now let
19 me explain why. I heard two things today, and I had a bunch
20 of notes typed out and ready to present about the burden and
21 about it's already collected, about the timing, about other
22 cases that have allowed this type of discovery, some even
23 before a consolidated complaint.

24 But I heard today about the tutorial, and a lot of
25 times plaintiffs come into these cases at a severe

1 informational disadvantage. We hire experts. We get as
2 much information about the market. And in this case,
3 there's a docket. And on that docket, we found e-mails.
4 And those e-mails show Mr. Wistisen collecting pricing
5 information from two different competitors on one day -- and
6 I can give you the cites for our complaint in WNT which has
7 that -- and then one day later sharing the competitor
8 information with the others.

9 As an antitrust lawyer, I look at that with
10 concern. As a plaintiffs' lawyer, I think that's a great
11 piece of information to include in a complaint, but the
12 problem with that record is twofold. And I understand and
13 respect Your Honor's point about all the documents that were
14 produced to the DOJ. But part of our ask is a little more
15 discrete because that record is -- most of it is under seal,
16 a lot of it is redacted. We were able to piece together
17 bits and pieces of e-mails for whatever reason weren't
18 subject to the seal.

19 THE COURT: And, Ms. Justice, my comment doesn't
20 go to if you get access to relevant documents, but when you
21 get access to them is more what the thrust is of my comment.
22 Is that, you know, if we first get a consolidated complaint
23 and if there's a motion to dismiss, that's only going to be
24 assessing the sufficiency of the pleading, and we're not
25 even into anything that is factual beyond what's simply

1 averred in the pleading itself and there will be *Twigbal*
2 challenges around it that I have heard already, but you
3 don't need the discovery yet for that. So I'm simply trying
4 to do it in the most efficient way.

5 Having said that, I'll give you a chance to
6 respond, but it sounded to me as though you were concerned
7 that you're not going to get anything from the action. I
8 don't know what you'll get. I'm just talking about when
9 you'll get it.

10 MS. JUSTICE: I think the defendants' papers are
11 already submitted in this case. They are able to cherry
12 pick and choose what they cite from that record, and we
13 don't have equal access to that information.

14 Even -- set aside the complaint. I think our
15 complaints are robust. I think they will survive a motion
16 to dismiss. We have e-mails along the lines that I've
17 described. We don't have the full universe, but it's
18 something to get the process started, the efficiency started
19 because it's already a collected universe of documents and
20 it's very discrete.

21 The other point I would make is depending on the
22 timing of the tutorial, it's information that can help
23 inform plaintiffs so that we can help inform Your Honor.

24 THE COURT: Uh-huh.

25 MS. JUSTICE: And I think that's kind of also

1 important for us.

2 THE COURT: Uh-huh. No. Understood. And totally
3 open to the timing of the tutorial, probably sometime short
4 of the class certification hearing. And I don't know in the
5 other case when the question of a tutorial came up, whether
6 it was at the beginning of the case or too close to the
7 class certification hearing.

8 But, no, that's understandable, and I certainly
9 don't read anything into the fact that there are facts yet
10 to be discovered by the plaintiffs in the case. You're on
11 the front end of it -- in some ways in the front end of it,
12 so that I understand.

13 I was here mostly referring to the issue of
14 modifying the discovery stay. The plaintiffs had asked to
15 have the stay lifted now; and then for starters, among other
16 things, just ship over the documents from the DOJ action and
17 then keep them cooking from there and we'll see what else we
18 need.

19 I'm not inclined to do that. I'm inclined to
20 first get consolidated complaints in place and then hear
21 whatever the motions to dismiss are on that, and then we'll
22 get to the fact discovery in earnest, you know, after that.

23 And, again, the motion to dismiss is just looking
24 at the sufficiency of the pleading; and if something has
25 been inadequately pled, if it can be pled properly, then

1 there will be an opportunity to amend to address that.

2 So I'm not trying to pour out justiciable claims,
3 but the first thing is to address the pleading itself, and
4 before we can do that, we have to have a pleading itself
5 and -- before we get to discovery. Otherwise, it's a mess
6 because it's impossible to order a preliminary disclosure of
7 documents or discovery without that leading to a profusion
8 of issues for Judge Schultz when we don't even have any
9 complaints in place yet to talk about what the particular
10 document is relevant to, and it just gets to be a very
11 inefficient process on the front end and I'd rather do it in
12 an orderly, sequential way.

13 MS. JUSTICE: Understood, Your Honor.

14 THE COURT: All right. Is there anything further?

15 MS. JUSTICE: Thank you.

16 THE COURT: All right. Thank you, Ms. Justice.

17 Mr. Buterman, I assume you're fine with that?

18 MR. BUTERMAN: Yes, Your Honor. We -- we are
19 certainly fine with that. The only point, though, that I
20 would add, Your Honor, is that when we do get past the
21 filing of those motions to dismiss, one of the issues that
22 Courts in the -- in the circuit look at sometimes is the
23 sufficiency of the motion and whether there's a likelihood
24 of success with respect to the motion in determining whether
25 the stay should extend until the end of discovery.

1 THE COURT: So I'm going to decide likelihood of
2 success before they've been able to decide whether they are
3 likely to be successful?

4 MR. BUTERMAN: The case law provides a much lesser
5 burden for the defendants to meet with respect to that,
6 Your Honor, although you've raised a very good, logical
7 point with respect to that.

8 THE COURT: Right. No. It's okay. But we're not
9 here on an injunction, so...

10 MR. BUTERMAN: They -- for whatever reason, the
11 Courts use likelihood of success as their standard when it
12 comes to this. But, otherwise, we're fine, Your Honor,
13 proceeding --

14 THE COURT: We'll cross that bridge when we get
15 there too, and I will read and consider whatever authorities
16 get submitted on it.

17 MR. BUTERMAN: Thank you.

18 THE COURT: But I expect this to look what I call
19 normal.

20 MR. BUTERMAN: Yes, Your Honor.

21 THE COURT: Right. Okay.

22 Why don't we talk, Mr. Hedlund, if you'd come back
23 up again, just on the case schedule and the case
24 organization. I've got something I'd like for you and
25 Mr. Buterman to respond to. It's just something I'm

1 wondering about on this case unless --

2 MR. BUTERMAN: Yes, Your Honor, my colleague
3 Mr. Stenerson is going to handle this.

4 THE COURT: Mr. Stenerson, come on up, then. Let
5 me tell you what I'm wondering about, and then you all can
6 jump into your respective views on the schedule.

7 I'm wondering whether it makes sense to do some
8 form of staging in this case. And by way of "staging," it
9 seems to me that unless there's proof of collusion on the
10 front end, there's nothing else to talk about anywhere.
11 It's end of it. So I'm looking at collusion plus
12 anticompetitive effect related to the collusion, which are
13 kind of two parts. But on the front end of it, I've got to
14 find some kind of collusive misconduct and then we can argue
15 later by way of damages how it translates.

16 So this is just my thinking out loud. I haven't
17 decided to stage anything. But I'm wondering about your
18 reactions to that. And it's not whether we get to all of
19 the aspects of the case because we're going to, but whether
20 we stage the discovery and perhaps even expedite getting at
21 the issue of whether there are facts or evidence to support
22 collusion first in the schedule.

23 So haven't had a chance to think about that, you
24 all, and so I have talked for about ten seconds more so that
25 you...

1 But just what your reactions are. And I'll give
2 you a chance to respond in writing, but I'm just sort of
3 thinking about whether there are some ways to make this case
4 more efficient in how we approach the schedule and
5 discovery. Mr. Hedlund.

6 MR. HEDLUND: Thank you, Your Honor, Dan Hedlund.
7 My experience with how -- what you have referred to as
8 staging, I think sometimes also gets referred to as
9 bifurcation in terms of discovery, is that in the end, even
10 though it suggests some efficiencies, I think a lot of
11 the -- of the information that comes out in discovery is so
12 intertwined that we've found it's been more efficient to
13 just sort of do it all in one shot, and that is what I have
14 seen in all the cases I have been involved in recently.

15 So, you know, without consulting with my many
16 colleagues here and pre-leadership appointment, this is like
17 when the DOJ people speak, me speaking for myself here, but
18 that would be -- would be my view is that it's not something
19 I would favor, but we'd be, of course, happy to consult with
20 all the plaintiffs and submit something in writing as well.

21 THE COURT: Yeah, no. I'll give you a chance to
22 submit something in writing. And I'm not convinced that my
23 own idea isn't a bad idea either. But it occurs to me, as I
24 listen to Mr. Buterman who was just up saying there is no
25 there there to any of this, that we have here the primary

1 focal point for defendant, Mr. Wistisen -- what's his name
2 again?

3 MR. HEDLUND: Wistisen.

4 THE COURT: -- Mr. Wistisen -- that I hear nobody
5 has spoken to in years, and even at that, he just produced a
6 report they gave to everybody, and there's no there there
7 with respect to collusion, and that, to me, is a thing that
8 can be factually ferreted out as either likely to be true or
9 not provable to be likely to be true.

10 So let me hear from you, Mr. Stenerson.

11 MR. STENERSON: Yes. Good afternoon, Your Honor.
12 Todd Stenerson from A&O Shearman on behalf of the Domino
13 defendants.

14 Your Honor, we have had recent experience in
15 antitrust cases where bifurcation is helpful and important
16 in resolving issues. I think it's like a lot of things,
17 it's the timing and scope of it, and so we would welcome the
18 opportunity to think about that further. And, like I said,
19 I do have some recent experience where that does facilitate
20 resolution.

21 THE COURT: Well, let me hear both sides out.
22 I'll give you a moment to do that in writing, to write back
23 to the Court. And I'm not certain what will be the ultimate
24 decision. If it proves to be a waste of time or something
25 that's tantamount to finger painting in the end, that who

1 can make any sense of it, then I won't do it. But if it
2 actually looks like it might make aspects of this more
3 efficient, then I will. Because if -- if we can't get
4 proofs on that fundamental issue, then there really won't be
5 much else to argue about. And then once that's established,
6 then there will be all kinds of arguments, I'm sure, over
7 how we show industry-wide harm and there will be different
8 arguments from different tranches of the plaintiffs in that
9 regard too, I'm sure.

10 So stay tuned. I just wanted to broach it. So if
11 we just -- let me set that aside for a moment and then hear
12 from each of you on what your issues are with the
13 prospective schedules you propose. I obviously have what
14 you submitted, and I will study it. But if there are things
15 you wanted to point out for the Court, I'll give you an
16 opportunity to do it.

17 MR. HEDLUND: Yes, Your Honor. Thank you for that
18 opportunity. We have submitted a proposed schedule and as
19 have defendants. We -- you know, there are certain items
20 which we disagree on, but there's also several dates which
21 we have agreed upon. I think two of the big ones that I see
22 currently in terms of differences, I mean, some of them are,
23 you know, sort of a difference of an amount of days and that
24 sort of thing, but in terms of more structural differences,
25 I think one is the negotiation of the ESI protocol, the

1 protective order, the 502(d) stipulation we think should
2 take place after lead counsel has been appointed because we
3 view that as a time, while, you know, the motions are being
4 briefed on Rule 12, to sort of move the ball forward as
5 we've discussed.

6 You know, we think that these are agreements that
7 we can reach agreement upon, and we don't want to have --
8 you know, assuming of course in plaintiffs' world we get
9 past the motion to dismiss and we commence with discovery,
10 then, you know, we want to be kind of ready to go and don't
11 want to have then spend additional time negotiating those
12 things. The defendants suggest that that take place after
13 the ruling on the motion to dismiss, so that would be one
14 structural item.

15 The other is the issue of expert reports and
16 *Daubert* motions as they relate to that. We have proposed
17 one report that covers both class certification and merits
18 issues to take place after discovery has closed when both of
19 those issues will be ripe. We believe that in those two
20 types of reports, there tends to be a fair amount of
21 overlap, and we think it's more efficient to do them at one
22 time, have the *Daubert* motions, and just go from there.

23 The defendants, as Your Honors are aware, propose
24 one round of class certification, expert reports, *Daubert*
25 motions, et cetera, and then a separate round of merits

1 reports with *Daubert* motions, which, if you look at the
2 amount of days involved with, you know, the submission of
3 those things, I think it almost adds up to another year
4 of -- in the schedule and as -- so, in short, we think it
5 would be good to, you know, be more efficient, roll more
6 things into one, and hopefully get to -- again, in our hope,
7 get to trial sooner in front of this Court on behalf of our
8 plaintiffs. So --

9 THE COURT: Thank you, Mr. Hedlund.

10 Mr. Stenerson.

11 MR. STENERSON: Your Honor. If it would be
12 helpful, I put the schedules next to each other, and I can
13 hand it up. I told Mr. Hedlund before the hearing that I
14 had done that. It might help the Court follow.

15 THE COURT: Sure. If you think it would be
16 helpful.

17 MR. STENERSON: If you think that will be of
18 assistance. I'll give Mr. Hedlund one as well. I'll
19 represent that I asked it to be exactly what is in the
20 submission, and I think we got it right.

21 THE COURT: Right. If you hand it to the deputy.

22 MR. STENERSON: Any errors are mine. For the
23 court reporter and then for both judges.

24 Largely I agree with Mr. Hedlund where the slight
25 areas of disagreement are. I would just note, and I asked

1 plaintiffs to rethink this before, that right out of the
2 gate, there's a slight timing disagreement. We'd like
3 60 days to respond to the motions to dismiss with 30 days to
4 reply. They have 40 and 15. As you might imagine, with
5 three tracks and consolidation, we would like that --

6 THE COURT: You probably don't need to talk about
7 the timing elements in here.

8 MR. STENERSON: Okay.

9 THE COURT: I'll get with Judge Schultz, and we'll
10 decide on those. And this will be helpful to see what each
11 side --

12 MR. STENERSON: Okay.

13 THE COURT: -- proposes. And, as well, we'll
14 decide the issue of the timing for the assessments of the
15 ESI protocols, the 502(d) protective order, and whether that
16 makes sense to delay all of that until after the motion to
17 dismiss or do we get certain things ready.

18 MR. STENERSON: Okay. Well, then, hearing that,
19 Your Honor, let me just move on to flag three things for the
20 Court.

21 First is we think -- and as a matter of efficiency
22 and even in the bifurcation question that the Court raised,
23 you know, even if the parties don't agree now, it's not a
24 never. And so our opening proposal is that the Court not
25 address any substantive schedule post motion to dismiss

1 opinion and order the parties that within 30 days of an
2 order not dismissing the case, that the parties submit as
3 much as possible a joint schedule going forward from there.
4 So that's our initial practical proposal, and we think that
5 that's a good place to start.

6 THE COURT: And my leaning, again, will be a
7 pragmatic one. That I don't see a reason to be jumping
8 headlong into substantive discovery if it's not even clear
9 what survives a motion to dismiss. On the other hand, I
10 don't see a need to forestall all of the preparatory work
11 necessarily if things can be put into place and ready to go.

12 MR. STENERSON: Sure.

13 THE COURT: So there's kind of a rule of reason in
14 that.

15 MR. STENERSON: Yeah.

16 THE COURT: And so I will be looking at what each
17 side suggests with that in mind.

18 MR. STENERSON: Thank you, Your Honor. That makes
19 good sense. And really I think the major place where the
20 parties diverge is whether or not to brief class
21 certification on top of summary judgment and have one set of
22 experts. The defense thinks that that is quite inefficient
23 for one key reason, right. If the plaintiffs win
24 everything, then you put it all up at the front. If the
25 defendants win everything, you don't get there.

1 But from a practical standpoint, when you have
2 parties brief summary judgment before class cert is decided,
3 the issues are not framed as to what is up for summary
4 judgment. And there's issues like one-way intervention of
5 whether or not we're moving against a named plaintiff. Here
6 we have three tracks of classes that are going to have
7 presumably at least three different class definitions with
8 potential subclasses, and that just takes away from the
9 defendants and the Court the ability to make those decisions
10 on scoping, whether it's a full denial of class cert or some
11 minor grant of class cert, before you get to the merits of
12 those outcomes.

13 And as you also know, Your Honor, the expert
14 issues on class cert really focus on commonality versus
15 individual issues as opposed to the substantive elements of
16 antitrust law. And that again is merits experts. Often we
17 use different experts to do that. And so just from an
18 efficiency standpoint and practically, it's really important
19 to the defendants to know what they are shooting at on
20 summary judgment if we ever get there. And we actually
21 would submit that briefing summary judgment, and I think the
22 plaintiffs propose within 30 days of class cert briefing
23 being completed, you know, we're kind of shooting at a
24 ghost, and it really should await class cert decisions and
25 then have that next round.

1 THE COURT: All right. So I've heard you both out
2 on that, and so I won't decide anything on that this
3 afternoon other than I hear you and you'll see, you know, a
4 ruling sort of reflected in what we issue. But I understand
5 the issues and the dynamics too.

6 If I can switch -- unless there's something
7 further, Mr. Stenerson, you'd like to say, I want to talk to
8 the plaintiffs about the plaintiffs' leadership.

9 MR. STENERSON: No. That's all, Your Honor.
10 Thank you for having us.

11 THE COURT: Thank you. Thank you.

12 So here's my question, Mr. Hedlund, about the
13 plaintiffs' leadership. I see the proposal for the three
14 tranches, a direct and then two indirect groups. What I
15 really am kind of thinking through is I like the idea of all
16 three of those tranches being represented in a plaintiffs'
17 steering committee, and I'll have consolidated complaints
18 for each tranche, but then I will put them all together
19 under one umbrella for the handling of the discovery and
20 then to have a leader for the plaintiffs' group for the
21 discovery consolidation.

22 And I wanted your reaction to that. I think you
23 had in mind having three different groups, which I
24 understand why you would want that, but the whole point of
25 this MDL, from the Court's perspective, is to make this a

1 more efficient process for the Court. And that doesn't make
2 it more efficient for the Court, let alone some of the
3 issues that will arise in discovery with third parties and
4 so on who may be getting multiple kinds of requests on
5 similar things from different groups of the plaintiffs and
6 the potential for inconsistent rulings or the lack of
7 coordination where things ought to be coordinated.

8 And so my leaning, at this point, is to appoint
9 leadership for each of the tranches, but they operate for
10 discovery purposes under one umbrella, the plaintiffs'
11 steering committee, with there being a liaison counsel. I
12 mean, you all have been to a lot of these rodeos, so you
13 know what a plaintiffs' steering committee is and liaison
14 counsel.

15 And then to the extent there's discovery being
16 served where there are specific items that are specific to a
17 certain tranche, you just coordinate that so that it appears
18 in the discovery that gets served as opposed to having
19 multiple different sets, which strikes me as ultimately more
20 inefficient and likely to create more confusion out in the
21 public and for Judge Schultz.

22 So that is simply my thinking. And I'm giving you
23 a chance to respond to the Judge's artist's conception of
24 the plaintiffs' leadership.

25 MR. HEDLUND: Permission to ask a question of

1 clarification, Your Honor?

2 So the sort of plaintiff steering committee that
3 you are talking about, it would be limited to sort of joint
4 discovery requests?

5 THE COURT: That's the idea. And obviously you
6 would -- you don't -- you have different needs with respect
7 to certainly damages discovery and that sort of thing. I
8 understand that. That would be coordinated, though, through
9 the same plaintiffs' steering committee such that if
10 discovery is being served, then the defendants are getting
11 sets of discovery that in general will include the various
12 requests that the plaintiffs have. There will be occasions
13 where there may be some things that only one tranche needs,
14 at which point that will get coordinated and get done, but
15 as an irregular verb. That it won't be the normal
16 conjugation, and so there may be some of those that will
17 occur.

18 You would be in your own respective camps
19 obviously on the class cert motions and other aspects of the
20 case and certainly going toward trial even consolidated, so
21 this is just simply trying to make the discovery itself more
22 efficient and not have multiple rounds of discovery on
23 similar things going to either the defendants or the third
24 parties, and as well, I think to cut down on the confusion
25 that results in motion practice that percolates up to Judge

1 Schultz or to me.

2 MR. HEDLUND: Thank you, Your Honor. Again, with
3 the caveat that I'm just one person here speaking, I think,
4 in practice, what's happened in the other cases where there
5 are these three different tranches of cases -- my firm is
6 co-lead at different levels in the *beef*, *pork*, and *chicken*
7 case, as are many of the people who are in some of the
8 proposed leadership in the cases here -- there's been -- I
9 think everyone has worked very well together in terms of
10 coordinating discovery, not being inefficient, for example,
11 with deposition protocols.

12 There typically has been one person from a class
13 who's been designated to take the lead on that deposition.
14 The other classes will be there, and they'll ask, if
15 necessary, questions that are specific to their own class's
16 discovery, as Your Honor has sort of foreshadowed, but I
17 really feel like we -- we -- so far we've done that. We've
18 worked very well together, but if there's sort of a proposal
19 -- well, not that you would propose necessarily, but if
20 there's some other --

21 THE COURT: I'm not proposing to you yet, I'm just
22 saying.

23 MR. HEDLUND: You know, I mean, look, I think all
24 the plaintiffs certainly agree that we want to do whatever
25 is, you know, efficient for the Court, and Your Honor

1 rightly points out that there are certain things that we do
2 need to be separated on in terms of discovery, in terms of
3 settlement, trial becomes a different issue. The indirect
4 purchasers have pass through issues, the direct purchasers
5 don't, but certainly we do all share one thing in common,
6 which is to establish liability against the defendants.

7 So we've worked closely together on that, and I
8 believe it's worked well, but, you know, if there's another
9 way to sort of establish coordination, I believe the
10 plaintiffs would be, you know, happy to consider it.

11 THE COURT: Well, so the thing I'll throw back to
12 the plaintiffs to think about is that if you are, all the
13 various tranches, to be coordinated under one umbrella, how
14 might it best work. And if you wanted to make that approach
15 workable.

16 And I understand some of the things you've been
17 used to historically. I mean, I hear that. But it's not
18 what I'm talking about. And so I'm talking about a
19 different approach; and then, you know, is it workable, and,
20 if so, how would you like to have it work if that were to be
21 the case.

22 And you ought to arrive at the same place,
23 frankly. If you are all able to coordinate and work
24 together in other contexts that way, then this is simply a
25 formalized version of what you are already doing. And it's

1 not precluding anybody asking the questions that are
2 specific to your interests at a deposition, for example.
3 It's not what it's meant to do. It just means that there is
4 a deposition and not three of them with the same person who
5 has, you know, similar information to give. So it bakes in
6 a kind of coordination, and that's the whole point of it.
7 So not to preclude anybody from developing their facts or
8 evidence but to coordinate it.

9 So I'll give that to you all to think about in
10 what gets pushed out from this hearing too, and we'll ask
11 for a response from the plaintiffs.

12 MR. HEDLUND: Understood, Your Honor.

13 THE COURT: All right. So anything further? You
14 might -- I know that I've got a motion pending for -- from
15 you, I think, Mr. Hedlund, at least from you or
16 Mr. Gustafson, appointment of lead counsel, and the others
17 are coming in. I plan to address the schedule for those, at
18 least a ruling on those and will push that out, but I wanted
19 you to hear first that I'm thinking of having whoever those
20 leaders are to come together as part of a plaintiffs'
21 steering committee beyond, and that may, in some ways,
22 change what you submitted. I don't know. But I wanted to
23 broach it, and if it does, to give you a chance to edit or
24 modify what you have submitted. All right?

25 MR. HEDLUND: Appreciate that, Your Honor.

1 THE COURT: So is there anything else,
2 Mr. Hedlund?

3 MR. HEDLUND: The only other thing I had on here
4 was there was some discussion in the papers about regular
5 status conferences with the Court. And just speaking,
6 again, from experience in both -- I keep coming back to *pork*
7 and *beef*. If you don't leave this hearing hungry, there's
8 something wrong; right? But in both those cases, we, at
9 least at some point, established regular status conferences
10 every 30 days. And at one point they were with Judge
11 Bowbeer, and then --

12 THE COURT: Mr. Hedlund, we will have them.

13 MR. HEDLUND: Oh, excellent. Very good.

14 THE COURT: I know that -- I saw the defense
15 perspective that we -- what was the word -- to defer until
16 necessary was the defense perspective, and I'll find they
17 are necessary regularly and -- to do them on a monthly
18 basis. And we'll decide -- I'll meet with Judge Schultz and
19 decide when we get our monthly process started. It may not
20 be next month. But we'll have regular monthly meetings, and
21 I will plan at this point to be there for most of them, but
22 some of them may be in front of Judge Schultz. We'll just
23 see kind of how we proceed.

24 So with that, is there anything further from you
25 for this afternoon, Mr. Hedlund?

1 MR. HEDLUND: No, other than my partner,
2 Mr. Gustafson, sends his regrets that he couldn't be here
3 today, and we look forward to, you know, pursuing this case
4 with both of Your Honors, but that covers the agenda.

5 THE COURT: Well, thank you. Thank you. It's --
6 and, Mr. Buterman, anything further from you?

7 MR. BUTERMAN: No, Your Honor. Thank you very
8 much.

9 THE COURT: All right. Thank you both. And it's
10 good to see a lot of familiar faces in the courtroom this
11 afternoon. And Mr. Raiter, you know, I have been seeing
12 Mr. Raiter's face from back at a time when we both had hair,
13 so it's been a long time. So thank you all, and the Court
14 will be in touch. We'll start pushing some orders out.
15 Court will stand adjourned.

16 THE COURTROOM DEPUTY: Thank you. All rise.

17 (Court adjourned at 3:15 p.m.)

18 * * *

19
20 I, Erin D. Drost, certify that the foregoing is a
21 correct transcript from the record of proceedings in the
22 above-entitled matter to the best of my ability.

23

24 Certified by: s/ Erin D. Drost

25 Erin D. Drost, RMR-CRR